

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0041 OF 2003S
(High Court Civil Action No. HPP 18 of 1999)

BETWEEN:

KARNAIL SINGH

Appellant

AND:

DHANRAJI SINGH

Respondent

In Chambers:

Smellie, JA

Hearing:

Friday 7th November 2003, Suva

Counsel:

**Dr. M.S. Sahu Khan for the Appellant
Mr V. Kapadia for the Respondent**

Date of Judgment:

Friday 7th November 2003

JUDGMENT OF SMELLIE – JA

Introduction

This is an application by the appellant for leave to appeal against orders of Scott J. delivered on the 11 February 2003 and the 14 May 2003 wherein the appellant was found to have failed to discharge his duties as trustee of his fathers estate to the great detriment of his aged and unwell mother. The 14/5/03 judgment ordered the sale of certain estate assets so that funds would become available to met the widow's needs. The appellant did not attend the hearings nor did the counsel appear on his behalf and as a consequence the orders were made in his absence and it is contended without jurisdiction.

Preliminary Procedural Matters

Dr. Sahu Khan at first contended that the proceedings in the High Court should have been commenced pursuant to Order 76 dealing with Probate Proceedings. After discussion however he withdrew that contention.

The affidavit filed in support of the applications was sworn by one Prem Chand who deposed in paragraph 1 that he was duly authorized agent of the appellant. Mr Chand then proceeded to depose among other things to the appellant's beliefs, knowledge and understanding. Pressed to site authority for such a procedure Counsel referred to Order 41 Rule 5(2) which reads:

“(2) An affidavits sworn for the purpose of being used in the interlocutory proceedings may contain statements of information or belief with the sources of grounds thereof.”

I entertain great doubts that Rule 5(2) authorises what occurred here. Be that as it may, however, in view of the conclusions I reach in this matter the question of the legitimacy of the affidavit is not a deciding factor.

Finally under this head the applicant primarily blames lawyers retained by him from time to time and his ignorance of the law for his non-appearance in person or by counsel at the various hearings. As Scott J. observed, in such circumstances the appellant should waive privilege and obtain an affidavit from the practitioner concerned. Whatever the position may have been in the past it is not enough today to rely on the bald statement “my lawyer let me down.” How a litigant has been let down, whether the lawyer agrees and what the litigant did to look after himself in any event, are all very relevant factors.

Is there a finite judgment?

As indicated above the judge of the High Court has progressed a certain distance in the process of ameliorating the widows plight. But the process is far

from complete. Although attractive offers in excess, it appears, of \$600,000.00 have been made for the major estate asset, the sale process has been put on hold pending the outcome of these applications and a further associated appeal in respect of which, however, I have no jurisdiction at this point.

Clearly then the orders are interlocutory. As a consequent the appellant faces two hurdles. First he must have leave to appeal an interlocutory order (s.12)(2)(f) of the Court of Appeal Act (Cap.12) and secondly his is out of time in respect of both interlocutory orders.

The appellant's position if leave not granted

Dr. Sahu Khan complains that although he may be able to redress the position in respect of the orders for sale made on the 14 May 2003 by representing his clients interests in the continuation of the case in the High Court he cannot circumvent the earlier judgment which found his client in the default of his fiduciary duties.

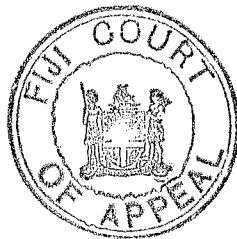
Like Scott J. however I am unimpressed with the appellants explanations for failing to appeal or have representation. If in fact his lawyers let him down he may have remedy against them. But given the widows age, health and undisputed needs the interests of justice dictate that the application for leave to appeal should be dismissed. I observe in passing that Mr Kapadia unequivocally stated in chambers before me that it was never suggested that if a dwelling is purchased for the widow it would become her property absolutely. It is accepted without question that all she would be entitled to is a life interest.

For the sake of completeness I also comment upon, without making any binding ruling, counsels contention that Scott J. in ordering the sale of assets and contemplating providing a home and lump sum for the widow is assuming powers under the Trustee Act which he does not have. I am not impressed with that

argument. I should have thought that the widows action can readily be seen as the presentation to the court of a scheme designed to provide her with what she is entitled to under the will and to redress the breaches of fiduciary duty of the appellant – see sections 85 and 86 of the Trustee Act (Cap 65).

Decision

The applications are dismissed. The respondent is entitled to the costs which I fix at \$500.00 plus the disbursements to be fixed by the Registrar.



Robert Smellie J.A.

Smellie, JA

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant
Messrs. Sherani and Company, Suva for the Respondent

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